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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 405

WILLIE PEEVYHOUSE and LUCILLE PEEVYHOUSE,
Husband and Wife,
Petitioners,

VERSUS

GARLAND COAL AND MINING COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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August, 1963.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

INDEX

	PAGE
Statement	1
Opinion Below	1
Judgment, 382 P.2d, p. 109, et seq.	2
Jurisdiction	3
The jurisdiction of this Court is invoked under Title 28, U.S.C., Secs. 1257(3) and 2101(c), and Rule 19 of the Supreme Court of the United States	3
Constitutions and Statutes Involved	4
Questions Presented	5
Statement of the Case	6
Reasons for Granting the Writ	9
Argument	11
I. The opinion of the Supreme Court is in direct conflict with the former opinions of the court on measure of damages for breach of contract	11
II. The judicial construction of state statutes are repugnant to and in conflict with the Constitution of the United States	14
III. May contracts be impaired by judicial decree?	15
IV. The four to four decision of the Supreme Court of Oklahoma	18
Conclusion	19

INDEX CONTINUED

PAGE

AUTHORITIES

United States Constitution:
Art. 1, Sec. 10 (cl 1) 4, 15

Oklahoma Constitution:
Art. 2, Sec. 15 ..... 4, 15
Art. 2, Sec. 7 4
Art. 7, Sec. 3 4

STATUTES:

Title 28, U.S.C., Secs. 1257(3), 2101(c) 3
Title 15, O.S.A., Sec. 152 4
Title 20, O.S.A., Sec. 13 4
Title 23, O.S.A., Sec. 21 4

CASES:

Angel v. Bullington, 67 S. Ct. 657, 330 U.S. 183, 91 L. Ed. 832 15
Ardizonne v. Archer, 72 Okla. 70, 178 Pac. 263 (1919) 11, 16
Atlantic Coast Line R. Co. v. Phillip, 67 S. Ct. 1584, 332 U.S. 168, 91 L. Ed. 1977 15
Brooklyn Savings Bank v. O'Neil, 65 S. Ct. 895, 324 U.S. 697, 89 L. Ed. 1296 (reh. den.), 65 S. Ct. 1189, 325 U.S. 893 15
Brown Crumer Inv. v. Town of North Miami (D.C. Fla.), 1935, 11 F. Supp. 73 16
Cities Service Oil v. Geolograph Co., 254 P.2d 775 (1953) 12
City of Enid, ex rel. Versluis v. Robinson, 39 F. Supp. 923 (Okla. 1941) 17
Cross Lake Shooting and Fishing Club v. Louisiana, 224 U.S. 632, 32 S. Ct. 577, 56 L. Ed. 924 16

INDEX CONTINUED

PAGE

Darr, Ex parte, 77 F. Supp. 553, aff'd 172 F.2d 668, aff'd, 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761 41

Dermot v. Jones (Ingle v. Jones), 2 Wall. (U.S.) 1, 17 L. Ed. 762 18

Douglas v. Pike County, 101 U.S. 687, 25 L. Ed. 968 16

Dunn v. Micco, 106 F.2d 356 (cert. den.), 60 S. Ct. 296, 308 U.S. 620, 84 L. Ed. 518 (reh. den.), 308 U.S. 639 17

Gelpske v. Dubuque, 1 Wall. 206, 17 L. Ed. 520 16

Goble v. Bell Oil and Gas Co., 97 Okla. 261, 223 Pac. 371 (1924) 11

Grand Lodge v. Hobbie, 100 Pac. 540 (1909) 19

Great Western Oil Co. v. Mitchell, 326 P.2d 794 (1958) 12

Groves v. John Wunder Company (Minn.), 286 N.W. 235 (1939) 12

Ingram v. Eddington, 83 S.W. 1132 18

National Fruit v. Durnell-Wright, 47 F. Supp. 499, aff'd, 140 F.2d 618 16

Paine v. Foster, 53 Pac. 109 (1896) 19

Shell v. Schmidt, 330 P 2d 817, cert. den., 3 L. Ed.2d 766 12

Union Bank v. Oxford, 90 Fed. 7 16

Young v. Rogen, 695 S. Ct. 1073, 337 U.S. 235, 93 L. Ed. 1333 15

APPENDIX

Appendix A:
Coal Lease i-vi

Appendix B:
Judgment of the Supreme Court of Oklahoma vii-xxix

INDEX CONTINUED

PAGE

Appendix C:
Order Correcting Voting on Opinion xxx

Appendix D:
Order Denying Rehearing xxxi

Appendix E:
Notice of Filing of Petition for Certiorari and Appeal to the Supreme Court of the United States ..... xxxii-xxxiv

In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

WILLIE PEEVYHOUSE and LUCILLE PEEVYHOUSE,
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Petitioners,

VERSUS

GARLAND COAL AND MINING COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioners pray that a writ of certiorari issue to the Supreme Court of the State of Oklahoma to review the judgment of the Supreme Court of the State of Oklahoma, entered in this cause on December 11, 1962, with modification by supplemental opinion March 26, 1963, and Denial of Second Petition for Rehearing on May 28, 1963.

OPINION BELOW

The Supreme Court of Oklahoma, on December 11, 1962, in an opinion written by Justice Jackson and concurred in by three other Justices, with a written dissenting opinion with four of the justices dissenting (Justice Welch

the ninth member of the Supreme Court of Oklahoma, is not shown as having participated in the original opinion), entered a judgment affirming the decision of the trial court of Oklahoma County, Oklahoma, and reducing a $5,000.00 judgment for petitioners to $306.00.

However, on March 26, 1963, the Court, on petition for rehearing and in a supplemental opinion, denied a first petition for rehearing and the supplemental opinion on rehearing written by Justice Jackson and concurred in by Justices Halley, Davison and Johnson and Justice Welch (who is not shown as participating on either side in the original December 11, 1962, opinion), which opinion answered the legal questions contained in the petition for rehearing and denied same.

The judgment of the Supreme Court of Oklahoma is reported in 382 Pacific (2d), page 109, *et seq.*, which, with the dissenting opinion and supplemental opinion on rehearing appears in Appendix B.

The order denying the second petition for rehearing on May 28, 1963.

In that opinion, the Oklahoma Supreme Court, although stating that "it appears that this precise question has never been presented to this court" held and construed the statutes different than before. The Court had heretofore held that the measure of damages for breach of a contract to drill an oil well was the reasonable costs of drilling the well, but here applied a rule never, to our knowledge, applied in Oklahoma, which rule so applied is that the relative economic benefit rule, rather than the

costs of performance rule, was applicable and that the $5,000.00 judgment for damages recovered by the Petitioners is reduced to $300.00. That the decision did not overrule prior decisions and that Art. 1, Sec. 10, of the Constitution of the United States applied to the legislative impairment, but not to judicial impairment of contract rights. The opinions are printed in Appendix B.

Appeal was had by Petitioners and Respondents and resulted in affirmance by four Justices and four dissenting, but the $5,000.00 judgment for Petitioners was reduced to $300.00.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on December 11, 1962. Supplemental opinion, March 26, 1963, and rehearing were denied on May 28, 1963 (Appendix B). The jurisdiction of this Court is invoked under Title 28, U.S.C., Sections 1257(3) and 2101(c), and Rule 19 of the Supreme Court of the United States.

The constitutionality of the decision of the Oklahoma Court in this case was raised in the petition for rehearing (see transcript of record) and comments thereon in supplemen to opinion by the Court (Appendix B).

The Petitioners have exhausted all of their state remedies.

CONSTITUTIONS AND STATUTES INVOLVED

Statutes

Title 23, Section 21, O.S.A.: General rule as to damages.

Title 15, Section 152, O.S.A.: Intent of contract controls.

Title 20, Section 13, O.S.A.:

> "a concurrence of a majority of the Justices of the whole Court in the determination of any cause shall be necessary * * *"

Constitution of Oklahoma

Article 2, Section 15:

> "* * * nor any law impairing the obligation of a contract shall ever be passed"

Article 2, Section 7:

> "no person shall be deprived of property, without due process of law."

Article 7, Section 3:

> "A majority of the members of the Supreme Court shall constitute a quorum, and the concurrence of the majority of said court shall be necessary to decide any question."

Constitution of the United States

Article 1, Section 10 (cl 1):

> "No state shall pass a law impairing the obligations of a contract."

Fifth Amendment to:

> "No persons shall be deprived of property without due process of law."

Fourteenth Amendment to:

"nor shall any state deprive any person of—or property without due process of law."

QUESTIONS PRESENTED

1. When the Petitioners and Respondent entered into the coal mining contract in 1954, they settled their obligations and rights under the laws of Oklahoma and the contract bound it to return the farm to it's original condition.

2. That the Supreme Court of Oklahoma violated the Constitution of the United States and the Constitution of Oklahoma and by judicial decree nullified the provisions thereof that no law will be passed impairing the obligations of a contract.

3. Where the District Court has found there is a violation of the contract, and Respondent failed to return the farm to the contracted condition, and Petitioners sue for damages, being the cost of returning the farm to the contracted condition, whether the Supreme Court may, without rendering the provisions of the Constitution of the United States and the Constitution of Oklahoma meaningless, affirm the judgment of the trial court, but reduce the $5,000.00 judgment to $300.00 impair the obligations of the contract and release respondent from its contractual duty to perform the remedial work to restore the land to the contracted condition.

4. May the Supreme Court of Oklahoma, by judicial decree, impair the obligations of a contract and thereon nullify the provisions of Article 1, Section 10, Clause 1 and the 5th Amendment to the Constitution of the United States and Article 2, Section 15 of the Constitution of Oklahoma.

5. Whether the due process clause, Section 1, and equal protection clause of the Fourteenth Amendment is violated by the construction placed by Supreme Court of Oklahoma on Sections 96 and 97, Title 23, O.S.A.

6. May the Supreme Court of Oklahoma, with nine members on the Court, by an opinion written by one Justice and concurred in by three other Justices, and a dissent by four of the other Justices, who participated therein; affirm, but modify a judgment of the lower court, not by new trial or remittitur but by reducing the $5,000.00 award to $300.00, without violating Article 7, Section 3 of the Constitution of Oklahoma and Title 20, Section 13, O.S.A., requiring a concurrence of a majority of the members of the Court.

STATEMENT OF THE CASE

The Petitioners at all times material herein were the owners and in possession of the following described property situated in Haskell County, Oklahoma, to-wit:

> SW/4 SW/4, Sec. 7, Twp. 8 N-R 21 East, and S/2 NE/4 SE/4 Sec. 12, Twp. 8 N-R 20 East, Haskell County, Oklahoma, containing sixty (60) acres.

In November of 1954, Petitioners entered into a written coal mining lease with Respondent covering the above described property, for a specified term of five years which expired on the 23rd day of November, 1959. A copy of this lease appears in Appendix A.

Sometime after the execution of this lease respondent entered upon the premises and commenced mining operations thereon, described as "strip mining," where Respondent dug pits up to depths of fifty feet and two hundred and twenty-five feet in width and removed the coal deposits. These pits bisected the lands of the Petitioners and filled with water to depths ~~up to~~ forty feet. Respondent also diverted a stream of water that flowed across plaintiffs' land in digging the pits. These mining operations continued intermittently during the term of the lease.

By the specific provisions of the lease, and in addition to the payment of royalties and other provisions thereof, Respondent as lessee, pursuant to paragraph 7(b), 7(c), 7(d) and 7(f) of the lease, agreed after completion of its mining operations and after expiration of the lease, to make fills in the pits dug on the premises on the property lines in such a manner that fences could be placed on these property lines and access had to the opposite side of the pits; smooth off the tops of the spoil banks; leave the creek crossing the premises in such a condition that it would not interfere with the crossings to be made in the pits along property lines and leave no shale or dirt on the high wall side of the pits. (The high wall side being the side upon which no excavations had been made or commenced and upon which side no overburden is dumped.)

Following the expiration of the lease, Petitioners made demand of the Respondent that it carry out the specific provisions of the lease and do and perform those things as were herein provided. These demands were ignored and

Respondent admitted that it had failed to perform its part of the lease agreement.

This action was commenced in the District Court of Oklahoma County on February 29, 1960, to recover the sum of $25,000.00 as the reasonable costs of doing and performing the lease provisions which Respondent admittedly failed and refused to do after receiving full consideration from plaintiffs under the lease provisions.

It was stipulated between the parties that all the terms of the lease agreement had been complied with by the Respondent except paragraph 7(b), 7(c), 7(d), and 7(f) and it was admitted by the Respondent that it had not fulfilled these four provisions of the lease agreement. It was stipulated that the only issue remaining in the lawsuit was the proof and measure of damages to which the Petitioners were entitled (Tr. 6, 7). It was further stipulated by the parties during the trial that the Respondent received written notice from the Petitioners that they were claiming a breach of the terms of the contract, particularly paragraphs 7(b), 7(c), 7(d), and 7(f) (Tr. 132). At the conclusion of the trial, the trial court directed a verdict for Petitioners on the evidence adduced and the jury returned a verdict for the plaintiffs in the sum of Five Thousand Dollars ($5,000.00) from which verdict Petitioners have perfected this appeal and the Respondent has perfected its cross-appeal.

REASONS FOR GRANTING THE WRIT

1. The judgment of the Supreme Court of Oklahoma in this case cannot be left undisturbed and it is imperative that this Court correct the errors involved, for several reasons, any one of which qualifies for review by this Court, but which, taken together show a compelling need for this Court's attention.

In this case, the Supreme Court of Oklahoma reduced a money judgment awarded by a jury for the Petitioners from $5,000.00 on a contractual obligation to $300.00 and committed these errors in the process:

1. Failed to apply correctly the statutes of the State of Oklahoma by ignoring the trial judge's findings of fact that there was a breach of the contract by Respondent, upon which the trial court directed a verdict for the Petitioners.

2. The Court ignored the verdict of the jury for the Petitioners in the amount of $5,000.00 and reduced the judgment to $300.00 upon a theory of the law which the Court had not passed on previously that cannot stand under the provisions of both the Constitution of Oklahoma and the Constitution of the United States.

3. The Court purports to decide a case of first impression in this State, and enter a judgment that will impair all contractual leases regardless of the express terms thereof, and excuse the performance of the obligation to return used land to its former condition and relieve the lessee from that part of the obligation of the contract, all by an opinion of

the Court of December 11, 1962, with four Justices voting for the opinion and four Justices dissenting.*

4. Such judgment conflicts with Article 2, Section 15 of the Constitution of the State of Oklahoma, impairing the obligations of a contract. It violated the Fifth Amendment to the Constitution of the United States in that it deprives the Petitioners of their property without due process of law and takes same without just compensation. The judgment conflicts with Article 1, Section 10 providing no State shall pass any law impairing the obligation of a contract. The opinion and judgment impairs the provision of the contract by judicial decree.

   The judgment takes from Petitioners their express contractual rights to require the Respondent to return the land to its original condition or to pay the damages for the costs of returning same; it permits the Respondent to profit by its wrong; it excuses the Respondent from performance of its express contract or to pay the damages for its failure to do so.

5. That the construction of Sections 96 and 97, Title 23, O.S.A., by the Supreme Court of Oklahoma, is repugnant to and in conflict with the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

6. The Supreme Court of Oklahoma may not by judicial opinion or decree, nullify the provisions of the Federal or State Constitutions nor impair

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* The original typewritten opinion of the Court shows Justice Williams voting for the majority opinion; but the Court corrected this by order (Appendix C), showing that Justice Williams dissented. The West Publishing Co. advance sheet shows the opinion four to four. (382 P.2d 109.)

the obligations of a contract. This Court has granted certiorari in cases where an important question involving constitutional rights and protecting against impairment of contracts was presented.

ARGUMENT

I. The opinion of the Supreme Court is in direct conflict with the former opinions of the court on measure of damages for breach of contract.

In *Ardizonne* v. *Archer*, 72 Okla. 70, 178 Pac. 263 (1919), the Oklahoma Court held that the measure of damages for breach of a contract to drill an oil well was the reasonable cost of drilling the well.

The Petitioners and Respondent had several conferences before entering into the contract in 1954, concerning return of the land to an agreed condition (fill up the pits), when the mining was completed. The contract specifically provided for and bound Respondent to perform the remedial work.

The Oklahoma Court held in *Goble* v. *Bell Oil and Gas Co.*, 97 Okla. 261, 223 Pac. 371 (1924):

> "Even though the contract contains harsh and burdensome terms which the court does not in all respects approve, it is the province of the parties in relation to lawful subject matter to fix their rights and obligations, and the court will give the contract effect according to its expressed provisions, unless it be shown by competent evidence proof that the written agreement as executed is the result of fraud, mistake, or accident."

See *Cities Service Oil v. Geolograph Co.*, 254 P.2d 775 (1953), and *Great Western Oil Co. v. Mitchell*, 326 P.2d 794 (1958).

The leading case of *Groves v. John Wunder Company* (Minn.), 286 N.W. 235 (1939), was a case involving breach of contract for removal of sand and gravel and failing to leave the realty at a uniform grade and held the proper measure of damages to be:

> "The owner's or employer's damages for such a breach (i.e. breach hypothesized in 2nd syllabus) are to be measured, not in respect to the value of the land to be improved, but by the reasonable cost of doing that which the contract promised to do and which he left undone."

The defense of economic waste was made and rejected by the Minnesota Supreme Court.

The Supreme Court of Oklahoma, in the case at bar, rejected the rule of the measure of damages adopted by the Minnesota Court and which had been followed by the Oklahoma Court, at the time the contract was entered into, and adopted the economic waste theory of measure of damages.

There is a complete brief in *Shell v. Schmidt*, 330 P.2d 817, *cert. denied*, 3 L. Ed.2d 766.

In our case, the coal mining contract was entered into in good faith by Petitioners and Respondent. The terms were fair. The contract (Appendix A) specifically provided for the filling in and leveling of the land and restoring it to its former condition and all remedial work was to be

performed by Respondent at its costs. The Petitioners insisted on these provisions before they entered into the contract.

The Respondent admittedly never performed or attempted to perform this part of the contract. Paragraphs 7(b), 7(c), 7(d) and 7(f) (Appendix. A) are all simple terms of a contract and Respondent's breach was willful and not in good faith. The trial court so held and instructed the jury to return a verdict for Petitioners and left the amount of damages to the jury which fixed the recovery at $5,000.00.

Respondent knew, in 1954, when the contract was made, the costs of compliance and that they might or could be disproportionate to the value or benefits received by Petitioners for the performance.

Respondent moved in, began mining operations, destroyed the Petitioners' homestead land and took the coal, used the land, and then refused to perform the remedial work on a theory of law that the 1963 measure of damages should be the economic value of performance to the Respondent instead of the cost of performance.

No set of facts existed in this case that would permit this theory of law to be either reason or justice.

Respondent made no effort to perform. This coal mining contract between Petitioners and Respondent is clear and unambiguous and all parties in 1954 understood all the terms thereof and the costs of fulfilling the obligations. It was not tainted with fraud, immoral, and was not

entered with by mistake or accident and is not contrary to public policy. Respondent is experienced in mining operations and could have complied with the remedial work which in 1954 Respondent agreed to do.

Respondent has accepted and reaped the benefits, but shuns the liabilities, and urges that Petitioners' benefits be denied, which inure to the direct benefit of Respondent.

Could this be reason or justice under the laws of damages for willful breach of contract? Take the benefits but be relieved from the obligations.

Petitioners were entitled to specific performance of the contract and since Respondent failed to perform, the proper measure of damages should be the cost of performance which was alleged and proved to be $25,000.00.

Affirmance of a judgment holding contrary would do irreparable violence to contractual rights, and impair obligations of contracts.

II. The judicial construction of state statutes are repugnant to and in conflict with the Constitution of the United States.

Errors, if any, of state courts on federal constitutional questions, are properly corrected in the United States Supreme Court. *Ex parte Darr*, 77 F. Supp. 553, *affirmed* 172 F.2d 668, *affirmed* 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761.

A state court may choose the procedure it deems appropriate for the vindication of federal rights, but where the state court of last resort closes the door to any con-

sideration of a claim or denial of a federal right, it is not simply a question of state procedure. *Young* v. *Rogen*, 695 S. Ct. 1073, 337 U.S. 235, 93 L. Ed. 1333.

The Supreme Court will grant certiorari to review a decision involving a federal question of substance not heretofore determined by the Supreme Court. *Brooklyn Savings Bank* v. *O'Neil*, 65 S. Ct. 895, 324 U.S. 697, 89 L. Ed. 1296 (*reh. den.*), 65 S. Ct. 1189, 325 U.S. 893.

Whether claims are based on a federal right or are merely of local concern is a federal question on which the United States Supreme Court and not Supreme Court of State, has final authority. Likewise where an asserted federal right is denied, the sufficiency of grounds of denial is for the United State Supreme Court to decide. *Angel* v. *Bullington*, 67 S. Ct. 657, 330 U.S. 183, 91 L. Ed. 832.

A claim that a state statute impairs the obligation of a contract is an appeal to the United States Constitution and cannot be foreclosed by state court's determination whether there was a contract or what were its obligations. *Atlantic Coast Line R. Co.* v. *Phillips*, 67 S. Ct. 1584, 332 U.S. 168, 91 L. Ed. 1977.

III. May contracts be impaired by judicial decree?

The United States Constitution (Article 1, Section 10) prohibits impairment of contracts by laws (legislative). The Oklahoma Constitution (Article 2, Section 15) has a similar provision.

The opinion of the Supreme Court of Oklahoma impairs and destroys the several contract provisions (Section 7, Appendix A) of the contract of the parties. See *Gelpske* v. *Dubuque*, 1 Wall. 206; 17 L. Ed. 520.

Courts should hesitate to destroy economic values which their decisions have created by reversing those decisions. *National Fruit* v. *Durnell-Wright*, 47 F. Supp. 499, *affirmed* 140 F.2d 618.

State judicial decisions can no more impair contract than can legislative act. *Brown Cramer Inv.* v. *Town of North Miami* (D.C. Fla.), 1935, 11 F. Supp. 73; *Union Bank* v. *Oxford*, 90 Fed. 7, at 10; *Douglas* v. *Pike County*, 101 U.S. 687; 25 L. Ed. 968.

When a state court, either expressly or by necessary implication, gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired, a federal question is presented. *Cross Lake Shooting and Fishing Club* v. *Louisiana*, 224 U.S. 632, 638, 639, 32 S. Ct. 577, 56 L. Ed. 924.

In 1954, when this contract was entered into, the majority rule followed in Oklahoma was that announced in *Ardizonne* v. *Archer*, 72 Okla. 70; 178 Pac. 263:

> "The measure of damages for the breach of an express covenant, in an oil and gas lease, to drill one well to the top of the Mississippi lime, is held, under the facts and circumstances of this case, to be the reasonable cost of drilling the same."

Under the rule, this interpretation of the law for breach of contract to perform certain acts became as much a part

of the contract between the Petitioners and the Respondent as if it was written into the contract.

In *City of Enid, ex rel: Versluis v. Robinson*, 39 F. Supp. 923 (Okla. 1941), it was held:

> "A decision of the Oklahoma Supreme Court rendered after issuance of street improvement bonds by a city in Oklahoma, could not impair rights of bond holders, since the law as it existed, when bond contract was made, and the legal interpretation of such law as announced by Oklahoma Supreme Court at that time entered into and became a part of the contract and could not be impaired by subsequent decision to the contrary. (Also see City of Clinton v. First National Bank, 39 F. Supp. 909.)"

In its opinion in the case at bar the Court holds entirely different and claims that the provisions of the contract made in 1954 between the parties to restore the land can be excused and the damages for their intentional and willful breach thereof can be measured by an entirely different rule that deprives the Petitioners from their constitutional rights and changes the law that existed when the contract was made.

In the case of *Dunn v. Mitco*, 106 F.2d [illegible] (*cert. den.*) 60 S. Ct. 296, 308 U.S. 620, 84 L. Ed. 518 (*reh. den.*), 308 U.S. 639, the Court held:

> "The rule of stare decisis applies with peculiar force and strictness to decisions which have established a rule of property since such rules should be certain and stable."

The law regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way and a loss must ensue it leaves the loss where the contract places it. If the parties have made no provisions for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annuled and it does not permit to be interpolated what the parties themselves have not stipulated. *Dermot* v. *Jones* (*Ingle* v. *Jones*), 2 Wall. (U.S.) 1, 17 L. Ed. 762.

IV. The four to four decision of the Supreme Court of Oklahoma.

Article 7, Section 2, Constitution of Oklahoma, provides for a majority vote of the Court to render a decision. Title 20, Section 1, O.S.A. implements the Constitution. The opinion affirming this case and reducing the judgment was rendered by four members of the Court. The typed opinion shows five Justices concurred but the Court entered an order correcting the voting to show that Justice Williams dissented (Appendix C), leaving the vote four to four. Can a Court affirm a judgment or reduce it without a majority of the members concurring?

In the Territorial Court case of *Ingram* v. *Eddington*, in 83 S.W. 1132, it was held that a 4 to 4 vote is an affirmance.

How can there be a supplemental opinion when there was no opinion in the first place?

Can a Justice of the Supreme Court who did not participate in the original opinion participate in the supplemental?

In *Paine v. Foster*, 53 Pac. 109 (1898), *affirmed* where the Chief Justice did not sit, Justice Bierer disqualified and the remaining three Justices being unable to concur in a reversal, the judgment of the District Court stands.

In *Grand Lodge v. Hobbie*, 100 Pac. 540 (1909), it was held:

> "Where a majority of the Supreme Court cannot agree upon a question before the court for determination within 6 months after submission of said cause the same should be dismissed."

The actual opinion of this Court affirming this case was on a 4 for and 4 against vote. How under the constitutional provision could they reduce the verdict of the jury without a majority vote. The supplement to the opinion only answered the constitutional questions raised in the petition for rehearing and neither modified nor changed the original judgment of December 11, 1962.

CONCLUSION

The trial court found an intentional and therefore willful violation of that part of the 1954 contract between Petitioners and Respondent and directed the jury to return a verdict for Petitioners which the jury fixed at $5,000.00 damages. The Supreme Court on appeal affirmed, but reduced the recovery to $300.00, applying a rule which was not in effect in Oklahoma in 1954 when the contract was made. Oklahoma had held the cost of performance was the measure of damages. *Ardizonne v. Archer*, 72 Okla. 70, 178 Pac. 263, but in 1963, the Court made a different rule in this case, where both cases were actions for nonperformance of contracts.

The nature and importance of the questions raised in this petition are important and there are special and compelling reasons for granting the writ, which reach constitutional dimensions and involve principles important to the public.

This is an unprecedented and extra legal basis to reduce a money judgment for damages. It is in conflict with the majority rule of other courts. This case is of great importance to the contractual rights of lessors and lessees involving real property and oil and gas mining leases and the law should be declared.

WHEREFORE, Petitioners pray that *certiorari* be granted and upon hearing the judgment of the Supreme Court of Oklahoma be vacated and a new trial be granted Petitioners.

Very respectfully submitted,

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August, 1963.

APPENDIX

APPENDIX A

PLAINTIFFS' EXHIBIT 1:

COAL LEASE

THIS LEASE executed this 23rd day of November, 1954 by and between Willie Peevyhouse and Lucille Peevyhouse, husband and wife, hereinafter called Lessors, and Garland Coal & Mining Company hereinafter called Lessee:

WITNESSETH

WHEREAS, the Lessors are the owners of, or have the right to mine and remove the coal underlying and the right to take all or any part of the surface of the following described lands in Haskell County, State of Oklahoma, to-wit:

> The Southwest Quarter of the Southwest Quarter of Section 7, Township 8 North and Range 21 East, and, the South Half of the Northeast Quarter of the Southeast Quarter of Section 12, Township 8 North and Range 20 East.

WHEREAS, Lessee desires to mine and remove the coal underlying said premises and Lessors desire to lease the same to Lessee for that purpose;

NOW THEREFORE, in consideration of the sum of One Dollar ($1.00) cash in hand paid by Lessee to Lessors, receipt whereof is hereby acknowledged, and in consideration of the performance by each party of the conditions hereinafter set forth, Lessors grant and lease to the Lessee the exclusive right to slope, shaft, deep mine or strip and remove coal underlying the above described property, together with the right to use and or remove any and all the surface of said lands necessarily incidental thereto, subject to the following terms and conditions:

[APPENDIX]

—1—

This lease shall be in full force and effect for a term and period of 5 years from and after the date hereof, unless terminated sooner under its provisions. * * *

—2—

* * * * * * *

—3—

Lessee agrees to pay to the Lessors upon all coal mined, removed and sold from these premises a royalty of 20 cents per ton of 2000 pounds, railroad weights to govern if shipped by rail, truck scale weights if loaded on trucks, such royalty to be paid not later than the 20th day of each month succeeding the month in which the same be mined, removed and sold, provided that minimum royalties which may have been advanced at the rates per acre herein set forth shall be credited on royalty due for coal mined and sold. And Lessee will furnish to the Lessors on or before said date a statement showing the amount of coal mined and removed and sold during the preceding month; the Lessors shall have the right at reasonable times to inspect Lessee's books for the purpose of verifying the amount of coal so mined and Lessors shall have the right at reasonable times to inspect Lessee's operations.

—4—

Lessee shall have the exclusive right to enter upon same and prospect for coal, drill holes and make any necessary excavations and if it determines coal be present in paying quantities, then to dig, mine or strip, remove, sell and dispose of all the mineable and marketable coal that in the opinion of the Lessee can be profitably mined and removed therefrom, together with all incidental mining rights necessary to the success of such operation, and the right of ingress and egress in, to and across said property, * * * for the purpose of entering upon said premises in

connection with the production and transportation of coal from said premises on adjacent lands.

—5—

After commencement, such operations shall be carried on in a miner-like and workmanlike manner, as usually conducted in similar operations. Lessee may strip the overburden from such coal as shall be profitably mineable and marketable and will pay all taxes arising from the mining operation, and Lessors agree that they will pay and keep paid all taxes upon the premises herein leased. Lessee shall pay for damages, caused by Lessee's prospecting operations, to growing crops on said lands.

—6—

It is understood that in the mining operations hereunder the surface of said land may be excavated and the Lessors agree to furnish Lessee, in consideration of said royalty, all surface as may be necessary to be used by Lessee in the operation of strip pits, and may be used by Lessee for drainage ditches, haulage roads, spoil banks, tipples, tracks, and any other structures that Lessee finds necessary in the operation of said strip pit or pits or coal mine and the Lessee agrees that all such structures shall be located consistent with good operating practice so as to cause the least damage or inconvenience to the owner or user of such surface; Lessee agrees that he will save Lessors harmless from claims arising out of the actual mining and removing of said coal and Lessors agree that they will save harmless and indemnify the Lessee from any claim or liability arising from any damage to the surface of these lands caused by such operations; it is further recognized the Lessee shall have the right without liability to the Lessor, wherever it may be necessary in conducting such operations, to change the course of any streams or water courses and to erect and maintain such drainage ditches as it shall deem

advisable having due regard for the successful operation of said strip pit and damage to the remainder of the property.

—7—

It is understood and agreed that in the type of operation contemplated by Lessee it is necessary to procure leases of other property from which coal can be mined or stripped so as to justify the investment to be made by Lessee and in consideration of the royalty herein paid, Lessors grant to the Lessee the right to haul over and across said premises and through said pits coal from adjacent lands free from any charge.

—7a—

Lessors hereby acknowledge receipt of the sum of $2,000.00 as advanced royalty which is to be credited on any royalty due for coal thereafter mined from said lands by said lessee from the first coal produced.

—7b—

Lessee agrees to make fills in the pits dug on said premises on the property line in such manner that fences can be placed thereon and access had to opposite sides of the pits.

—7c—

Lessee agrees to *smooth* off the top of the spoil banks on the above premises.

—7d—

Lessee agrees to leave the creek crossing the above premises in such a condition that it will not interfere with the crossings to be made in pits as set out in 7b.

—7e—

Lessee agrees to build and maintain a cattle guard in the south fence of SW SW of Section 7 if an access road is made through said fence.

—7f—

Lessee further agrees to leave no shale or dirt on the high wall of said pits.

—7g—

It is further agreed between the parties hereto that this lease is not to be assigned, transferred or sub-let without the written permission of the lessors; provided, however, that an assignment of this lease to the Canadian Mining Company shall not require such written permission.

—7h—

Lessee agrees to have the above described premises surveyed and the boundary lines on said premises established prior to commencement of digging coal.

—8—

The right is hereby conferred upon Lessee to cancel this Lease upon thirty (30) days' written notice when the operation of removal of coal therefrom shall in his judgment become unprofitable and Lessee shall be the sole judge as to when same is unprofitable.

—9—

In case Lessee fails to pay the royalty when due or fails to comply with any one of the other terms of this Lease, the Lessors shall give the Lessee fifteen (15) days' written notice, calling attention to the default by Lessee, specifying wherein the Lessee has failed to comply with the terms of this agreement, and, if at the end of said period, Lessee is still in default, the Lessors shall have the right to take immediate possession of the leased premises without let or hindrance, and the Lessee shall not have the right to remove any of its property, machinery, tools or supplies from the demised premises until all amounts due the Lessors have been paid in full.

In the event this Lease expires by operation of its own terms, or the Lessee elects to cancel the same under the provisions hereinabove set out, the Lessee shall have, provided it is not in default, six (6) months from said termination or cancellation within which to remove all of its property, machinery, tools, supplies or equipment that it might have upon said demised premises. All structures built or erected upon said premises shall be and remain the sole and separate property of the Lessee.

—10—

It is mutually understood and agreed that the right, privileges and obligations herein conferred on the parties shall be binding on the executors, administrators, heirs, successors or assigns of the parties hereto whether so specifically stated herein or not; * * * If the property is encumbered by a mortgage or other liens, Lessee shall have the right to pay said liens and deduct from royalty due Lessors.

IN WITNESS WHEREOF, the parties have set their hands this 23rd day of November, 1954.

/s/ Willie Peevyhouse
/s/ Lucille Peevyhouse
Lessors

Garland Coal and Mining Company
By /s/ Burrow Cumpton
Lessee

APPENDIX B

(Opinion of the Court)

WILLIE PEEVYHOUSE and LUCILLE PEEVYHOUSE,
Plaintiffs in Error,

v.

GARLAND COAL & MINING COMPANY,
Defendant in Error.

No. 39583.

Supreme Court of Oklahoma.
Dec. 11, 1962.

Modified and Rehearing Denied
March 26, 1963.

Second Rehearing Denied May 28, 1963.

Lessors brought action against lessee for damages for breach of coal mining lease. The District Court of Oklahoma County, W. R. Wallace, Jr., J., entered judgment for the lessees for an allegedly inadequate amount, and the lessees appealed, and the lessor cross-appealed. The Supreme Court, Jackson, J., held that where the lessee failed to perform provision of lease requiring the lessee at the end of the lease to perform remedial work, which would have cost an estimated $29,000, but which would have increased the value of the farm of the lessors only $300, relative economic benefit rule rather than cost of performance rule was applicable, and the lessors could recover only $300.

Judgment modified to reduce recovery from $5,000 to $300 and, as modified, affirmed.

Irwin, J., Williams, C. J., Blackbird, V. C. J., and Berry, J., dissented.

[APPENDIX]

1. Mines and Minerals, Key No. 68(1)

Where lessee failed to perform provision of coal mining lease requiring lessee at end of lease to perform remedial work, which would have cost estimated $29,000, but which would have increased value of farm of lessors only $300, relative economic benefit rule rather than cost of performance rule was applicable in lessors' action to recover damages of $25,000 for breach of contract, and lessors could recover only $300. 23 O.S. 1961 §§ 96, 97.

2. Mines and Minerals, Key No. 68(1)

Measure of damage for failure of lessee to perform remedial work as required by coal mining lease at end of lease is ordinarily reasonable cost of performance of work, but where lease provision breached was merely incidental to main purpose in view, and where economic benefit which would result to lessor by full performance of work is grossly disproportionate to cost of performance, damages recoverable by lessor are limited to diminution in value resulting to premises because of nonperformance.

On Rehearing.

3. Appeal and Error, Key No. 171(1)

Appellants could not change their theory of case on appeal.

4. Constitutional Law, Key No. 116

Supreme Court's decision did not impair obligation of contract of parties in violation of federal Constitution, where decision overruled no prior holdings of Supreme Court, and decision did not give effect to a subsequent state law. U.S.C.A. Const. art. 1, § 10.

5. Constitutional Law, Key No. 116

Constitutional provision forbidding impairment of obligation of contract relates to legislative action and not to judicial decisions of state court, where decisions of state

court do not expressly or by necessary implication give effect to subsequent state law whereby obligation of contract is impaired. U.S.C.A. Const. art. 1, § 10.

Syllabus by the Court

Where, in a coal mining lease, lessee agrees to perform certain remedial work on the premises concerned at the end of the lease period, and thereafter the contract is fully performed by both parties except that the remedial work is not done, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; however, where the contract provision which was breached was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance.

Appeal from the District Court of Oklahoma County; W. R. Wallace, Jr., Judge.

Action by Willie Peevyhouse and Lucille Peevyhouse, plaintiffs, against Garland Coal & Mining Company, defendant, for damages for breach of contract. From a judgment for plaintiffs, plaintiffs appeal and defendant cross-appeals. Modified and affirmed.

McConnell & Hanson, W. H. McConnell, Oklahoma City, for plaintiffs in error.

Looney, Watts, Looney, Nichols & Johnson, Tom D. Capshaw, Oklahoma City, for defendant in error.

JACKSON, Justice.

In the trial court, plaintiffs, Willie and Lucille Peevyhouse sued the defendant, Garland Coal and Mining Com-

pany, for damages for breach of contract. Judgment was for plaintiffs in an amount considerably less than was sued for. Plaintiffs appeal and defendant cross-appeals.

In the briefs on appeal, the parties present their argument and contentions under several propositions; however, they all stem from the basic question of whether the trial court properly instructed the jury on the measure of damages.

Briefly stated, the facts are as follows: plaintiffs owned a farm containing coal deposits, and in November, 1954, leased the premises to defendant for a period of five years for coal mining purposes. A "strip-mining" operation was contemplated in which the coal would be taken from pits on the surface of the ground, instead of from underground mine shafts. In addition to the usual covenants found in a coal mining lease, defendant specifically agreed to perform certain restorative and remedial work at the end of the lease period. It is unnecessary to set out the details of the work to be done, other than to say that it would involve the moving of many thousands of cubic yards of dirt, at a cost estimated by expert witnesses at about $29,000.00. However, plaintiffs sued for only $25,000.00.

During the trial, it was stipulated that all covenants and agreements in the lease contract had been fully carried out by both parties, except the remedial work mentioned above; defendant conceded that this work had not been done.

Plaintiffs introduced expert testimony as to the amount and nature of the work to be done, and its estimated cost. Over plaintiffs' objections, defendant thereafter introduced expert testimony as to the "diminution in value" of plaintiffs' farm resulting from the failure of defendant to render performance as agreed in the contract—that is, the difference between the present value of the farm, and what its

value would have been if defendant had done what it agreed to do.

At the conclusion of the trial, the court instructed the jury that it must return a verdict for plaintiffs, and left the amount of damages for jury determination. On the measure of damages, the court instructed the jury that it might consider the cost of performance of the work defendant agreed to do, "together with all of the evidence offered on behalf of either party."

It thus appears that the jury was at liberty to consider the "diminution in value" of plaintiffs' farm as well as the cost of "repair work" in determining the amount of damages.

It returned a verdict for plaintiffs for $500[illegible]00, only a fraction of the "cost of performance," *but more than the total value of the farm even after the remedial work is done.*

On appeal, the issue is sharply drawn. Plaintiffs contend that the true measure of damages in this case is what it will cost plaintiffs to obtain performance of the work that was not done because of defendant's default. Defendant argues that the measure of damages is the cost of performance "limited, however, to the total difference in the market value before and after the work was performed."

It appears that this precise question has not heretofore been presented to this court. In Ardizonne v. Archer, 72 Okl. 70, 178 P. 263, this court held that the measure of damages for breach of a contract to drill an oil well was the reasonable cost of drilling the well, but here a slightly different factual situation exists. The drilling of an oil well will yield valuable geological information, even if no oil or gas is found, and of course if the well is a producer, the value of the premises increases. In the case before us, it is argued by defendant with some force that the performance

of the remedial work defendant agreed to do will add at the most only a few hundred dollars to the value of plaintiffs' farm, and that the damages should be limited to that amount because that is all plaintiffs have lost.

Plaintiffs rely on Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502. In that case, the Minnesota court, in a substantially similar situation, adopted the "cost of performance" rule as opposed to the "value" rule. The result was to authorize a jury to give plaintiff damages in the amount of $60,000, where the real estate concerned would have been worth only $12,160, even if the work contracted for had been done.

It may be observed that Groves v. John Wunder Co., supra, is the only case which has come to our attention in which the cost of performance rule has been followed under circumstances where the cost of performance greatly exceeded the diminution in value resulting from the breach of contract. Incidentally, it appears that this case was decided by a plurality rather than a majority of the members of the court.

Defendant relies principally upon Sandy Valley & E. R. Co. v. Hughes, 175 Ky. 320, 194 S.W. 344; Bigham v. Wabash-Pittsburgh Terminal Ry. Co., 223 Pa. 106, 72 A. 318; and Sweeney v. Lewis Const. Co., 66 Wash. 490, 119 P. 1108. These were all cases in which, under similar circumstances, the appellate courts followed the "value" rule instead of the "cost of performance" rule. Plaintiff points out that in the earliest of these cases (Bigham) the court cites as authority on the measure of damages an earlier Pennsylvania *tort* case, and that the other two cases follow the first, with no explanation as to why a measure of damages ordinarily followed in cases sounding in tort should be used in contract cases. Nevertheless, it is of some significance that three out of four appellate courts have fol-

lowed the diminution in value rule under circumstances where, as here, the cost of performance greatly exceeds the diminution in value.

The explanation may be found in the fact that the situations presented are artificial ones. It is highly unlikely that the ordinary property owner would agree to pay $29,000 (or its equivalent) for the construction of "improvements" upon his property that would increase its value only about ($300) three hundred dollars. The result is that we are called upon to apply principles of law theoretically based upon reason and reality to a situation which is basically unreasonable and unrealistic.

In Groves v. John Wunder Co., supra, in arriving at its conclusions, the Minnesota court apparently considered the contract involved to be analogous to a building and construction contract, and cited authority for the proposition that the cost of performance or completion of the building as contracted is ordinarily the measure of damages in actions for damages for the breach of such a contract.

In an annotation following the Minnesota case beginning at 123 A.L.R. 515, the annotator places the three cases relied on by defendant (Sandy Valley, Bigham and Sweeney) under the classification of cases involving "grading and excavation contracts."

We do not think either analogy is strictly applicable to the case now before us. The primary purpose of the lease contract between plaintiffs and defendant was neither "building and construction" nor "grading and excavation." It was merely to accomplish the economical recovery and marketing of coal from the premises, to the profit of all parties. The special provisions of the lease contract pertaining to remedial work were incidental to the main object involved.

Even in the case of contracts that are unquestionably building and construction contracts, the authorities are not in agreement as to the factors to be considered in determining whether the cost of performance rule or the value rule should be applied. The American Law Institute's Restatement of the Law, Contracts, Volume 1, Sections 346 (1) (a) (i) and (ii) submits the proposition that the cost of performance is the proper measure of damages "if this is possible and does not involve *unreasonable economic waste*", and that the diminution in value caused by the breach is the proper measure "if construction and completion in accordance with the contract would involve *unreasonable economic waste*." (Emphasis supplied.) In an explanatory comment immediately following the text, the Restatement makes it clear that the "economic waste" referred to consists of the destruction of a substantially completed building or other structure. Of course no such destruction is involved in the case now before us.

On the other hand, in McCormick, Damages, Section 168, it is said with regard to building and construction contracts that "* * * in cases where the defect is one that can be repaired or cured without *undue expense*" the cost of performance is the proper measure of damages, but where "* * * the defect in material or construction is one that cannot be remedied without *an expenditure for reconstruction disproportionate to the end to be attained*" (emphasis supplied) the value rule should be followed. The same idea was expressed in Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889, 23 A.L.R. 1429, as follows:

> "The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value."

It thus appears that the prime consideration in the Restatement was "economic waste"; and that the prime consideration in McCormick, Damages, and in Jacob & Youngs, Inc. v. Kent, supra, was the relationship between the expense involved and the "end to be attained"—in other words, the "relative economic benefit."

[1] In view of the unrealistic fact situation in the instant case, and certain Oklahoma statutes to be hereinafter noted, we are of the opinion that the "relative economic benefit" is a proper consideration here. This is in accord with the recent case of Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78, where, in applying the cost rule, the Virginia court specifically noted that "* * * the defects are remediable from a practical standpoint and the costs *are not grossly disproportionate to the results to be obtained*". (Emphasis supplied.)

23 O.S. 1961 §§ 96 and 97 provide as follows:

"§ 96. * * * Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he would have gained by the full performance thereof on both sides." * * *

"§ 97. * * * Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice no more than reasonable damages can be recovered."

Although it is true that the above sections of the statute are applied most often in tort cases, they are by their own terms, and the decisions of this court, also applicable in actions for damages for breach of contract. It would seem that they are peculiarly applicable here where, under the "cost of performance" rule, plaintiffs might recover an amount about nine times the total value of their farm. Such

would seem to be "unconscionable and grossly oppressive damages, contrary to substantial justice" within the meaning of the statute. Also, it can hardly be denied that if plaintiffs here are permitted to recover under the "cost of performance" rule, they will receive a greater benefit from the breach than could be gained from full performance, contrary to the provisions of Sec. 96.

An analogy may be drawn between the cited sections, and the provisions of 15 O.S. 1961 §§ 214 and 215. These sections tend to render void any provisions of a contract which attempt to fix the amount of stipulated damages to be paid in case of a breach, except where it is impracticable or extremely difficult to determine the actual damages. This results in spite of the agreement of the parties, and the obvious and well known rationale is that insofar as they exceed the actual damages suffered, the stipulated damages amount to a penalty or forfeiture which the law does not favor.

23 O.S. 1961 §§ 96 and 97 have the same effect in the case now before us. *In spite of the agreement of the parties*, these sections limit the damages recoverable to a reasonable amount not "contrary to substantial justice"; they prevent plaintiffs from recovering a "greater amount in damages for the breach of an obligation" than they would have "gained by the full performance thereof."

[2] We therefore hold that where, in a coal mining lease, lessee agrees to perform certain remedial work on the premises concerned at the end of the lease period, and thereafter the contract is fully performed by both parties except that the remedial work is not done, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; however, where the contract provision breached was merely incidental to the main purpose in view, and where the economic benefit which

would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance.

We believe the above holding is in conformity with the intention of the Legislature as expressed in the statutes mentioned, and in harmony with the better-reasoned cases from the other jurisdictions where analogous fact situations have been considered. It should be noted that the rule as stated does not interfere with the property owner's right to "do what he will with his own" (Chamberlain v. Parker, 45 N.Y. 569), or his right, if he chooses, to contract for "improvements" which will actually have the effect of reducing his property's value. Where such result is in fact contemplated by the parties, and is a main or principal purpose of those contracting, it would seem that the measure of damages for breach would ordinarily be the cost of performance.

The above holding disposes of all of the arguments raised by the parties on appeal.

Under the most liberal view of the evidence herein, the diminution in value resulting to the premises because of non-performance of the remedial work was $300.00. After a careful search of the record, we have found no evidence of a higher figure, and plaintiffs do not argue in their briefs that a greater diminution in value was sustained. It thus appears that the judgment was clearly excessive, and that the amount for which judgment should have been rendered is definitely and satisfactorily shown by the record.

We are asked by each party to modify the judgment in accordance with the respective theories advanced, and it is conceded that we have authority to do so. 12 O.S. 1961

§ 952; Busboom v. Smith, 199 Okl. 688, 191 P.2d 198; Stumpf v. Stumpf, 173 Okl. 1, 46 P.2d 315.

We are of the opinion that the judgment of the trial court for plaintiffs should be, and it is hereby, modified and reduced to the sum of $300.00, and as so modified it is affirmed.

DAVISON, HALLEY, and JOHNSON, JJ., concur.

WILLIAMS, C. J., BLACKBIRD, V. C. J., and IRWIN and BERRY, JJ., dissent.

IRWIN, Justice (dissenting).

By the specific provisions in the coal mining lease under consideration, the defendant agreed as follows:

"* * * 7b Lessee agrees to make fills in the pits dug on said premises on the property line in such manner that fences can be placed hereon and access had to opposite sides of the pits.

"c Lessee agrees to smooth off the top of the spoil banks on the above premises.

"7d Lessee agrees to leave the creek crossing the above premises in such a condition that it will not interfere with the crossings to be made in pits as set out in 7b.

"7f Lessee further agrees to leave no shale or dirt on the high wall of said pits. * * *"

Following the expiration of the lease, plaintiffs made demand upon defendant that it carry out the provisions of the contract and to perform those covenants contained therein.

Defendant admits that it failed to perform its obligations that it agreed and contracted to perform under the

lease contract and there is nothing in the record which indicates that defendant could not perform its obligations. Therefore, in my opinion defendant's breach of the contract was wilful and not in good faith.

Although the contract speaks for itself, there were several negotiations between the plaintiffs and defendant before the contract was executed. Defendant admitted in the trial of the action, that plaintiffs insisted that the above provisions be included in the contract and that they would not agree to the coal mining lease unless the above provisions were included.

In consideration for the lease contract, plaintiffs were to receive a certain amount as royalty for the coal produced and marketed and in addition thereto their land was to be restored as provided in the contract.

Defendant received as consideration for the contract, its proportionate share of the coal produced and marketed and in addition thereto, the *right to use* plaintiffs' land in the furtherance of its mining operations.

The cost for performing the contract in question could have been reasonably approximated when the contract was negotiated and executed and there are no conditions now existing which could not have been reasonably anticipated by the parties. Therefore, defendant had knowledge, when it prevailed upon the plaintiffs to execute the lease, that the cost of performance might be disproportionate to the value or benefits received by plaintiff for the performance.

Defendant has received its benefits under the contract and now urges, in substance that plaintiffs' measure of damages or its failure to perform should be the economic value of performance to the plaintiffs and not the cost of performance.

If a peculiar set of facts should exist where the above rule should be applied as the proper measure of damages,

(and in my judgment those facts do not exist in the instant case) before such rule should be applied, consideration should be given to the benefits received or contracted for by the party who asserts the application of the rule.

Defendant did not have the right to mine plaintiffs' coal or to use plaintiffs' property for its mining operations without the consent of plaintiffs. Defendant had knowledge of the benefits that it would receive under the contract and the approximate cost of performing the contract. With this knowledge, it must be presumed that defendant thought that it would be to its economic advantage to enter into the contract with plaintiffs and that it would reap benefits from the contract, or it would have not entered into the contract.

Therefore, if the value of the performance of a contract should be considered in determining the measure of damages for breach of a contract, the value of the benefits received under the contract by a party who breaches a contract should also be considered. However, in my judgment, to give consideration to either in the instant action, completely rescinds and holds for naught the solemnity of the contract before us and makes an entirely new contract for the parties.

In Goble v. Bell Oil & Gas Co., 97 Okl. 261, 223 P. 371, we held:

> "Even though the contract contains harsh and burdensome terms which the court does not in all respects approve, it is the province of the parties in relation to lawful subject matter to fix their rights and obligations, and the court will give the contract effect according to its expressed provisions, unless it be shown by competent evidence proof that the written agreement as executed is the result of fraud, mistake, or accident."

In Cities Service Oil Co. v. Geolograph Co. Inc., 208 Okl. 178, 254 P.2d 773, we said:

"While we do not agree that the contract as presently written is an onerous one, we thing the short answer is that the folly or wisdom of a contract is not for the court to pass on."

In Great Western Oil & Gas Company v. Mitchell, Okl., 326 P.2d 794, we held:

"The law will not make a better contract for parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the others; the judicial function of a court of law is to enforce a contract as it is written."

I am mindful of Title 23 O.S. 1961 § 96, which provides that no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in cases not applicable herein. However, in my judgment, the above statutory provision is not applicable here.

In my judgment, we should follow the case of Groves v. John Wunder Company, 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502, which defendant agrees "that the fact situation is apparently similar to the one in the case at bar," and where the Supreme Court of Minnesota held:

"The owner's or employer's damages for such a breach (i.e. breach hypothesized in 2d syllabus) are to be measured, not in respect to the value of the land to be improved, but by the reasonable cost of doing that which the contractor promised to do and which he left undone."

The hypothesized breach referred to states that where the contractor's breach of a contract is wilful, that is, in bad faith, he is not entitled to any benefit of the equitable doctrine of substantial performance.

In the instant action defendant has made no attempt to even substantially perform. The contract in question is

not immoral, is not tainted with fraud, and was not entered into through mistake or accident and is not contrary to public policy. It is clear and unambiguous and the parties understood the terms thereof, and the approximate cost of fulfilling the obligations could have been approximately ascertained. There are no conditions existing now which could not have been reasonably anticipated when the contract was negotiated and executed. The defendant could have performed the contract if it desired. It has accepted and reaped the benefits of its contract and now urges that plaintiffs' benefits under the contract be denied. If plaintiffs' benefits are denied, such benefits would inure to the direct benefit of the defendant.

Therefore, in my opinion, the plaintiffs were entitled to specific performance of the contract and since defendant has failed to perform, the proper measure of damages should be the cost of performance. Any other measure of damage would be holding for naught the express provisions of the contract; would be taking from the plaintiffs the benefits of the contract and placing those benefits in defendant which has failed to perform its obligations; would be granting benefits to defendant without a resulting obligation; and would be completely rescinding the solemn obligation of the contract for the benefit of the defendant to the detriment of the plaintiffs by making an entirely new contract for the parties.

I therefore respectfully dissent to the opinion promulgated by a majority of my associates.

SUPPLEMENTAL OPINION ON REHEARING

JACKSON, Justice.

In a Petition for Rehearing, plaintiffs Peevyhouse have raised certain questions not presented in the original briefs on appeal.

They insist that the trial court excluded evidence as to the total value of the premises concerned, and, in effect, that they have not had their "day in court." This argument arises by reason of the fact that their farm consists not merely of the 60 acres covered by the coal mining lease, but includes other lands as well.

Plaintiffs originally pleaded two causes of action against the defendant mining company. The first one was for damages for breach of contract; the second one was for damages to the water well and home of plaintiffs, because of the use of excessively large charges of dynamite or blasting powder in close proximity to the home and well.

Numbered paragraph 2 of plaintiffs' petition alleges that they own and live upon 60 acres of land which are specifically described. *This is the only land described in the petition, and there is no allegation as to the ownership or leasing of any other lands.*

Page 4 of the transcript of evidence reveals that near the beginning of the trial, plaintiff Peevyhouse was asked a question concerning improvements he had made to his property. His answer was "For one thing I built a new home on the place in 1951, and along about that time I was building a pasture. And I would say *ninety percent of this 120 acres is in good grass.*" (Emphasis supplied.) Mr. Watts, defense counsel, then objected "to any testimony about the property, other than the 160 acres." (It is obvious that he means "60" instead of "160".) Further proceedings were as follows:

> "The Court: The objection will be sustained as to any other part. Go ahead.
>
> "Mr. McCornell (attorney for plaintiffs): Comes now the plaintiff and dismisses the second cause of action without prejudice."

It thus appears that plaintiffs made no complaint as to the court's exclusion of evidence concerning lands other than the 60 acres described in their petition.

Pages 7 and 8 of the transcript show that later during direct examination of Mr. Peevyhouse, the following occurred:

"Q. (By Mr. McConnell) Now, Mr. Peevyhouse, I ask you to step down here and I ask you if you are familiar with this sketch or drawing".

* * * * * * *

"A. Yes, I've got about 40 acres here, and here would be 20, and there would be 20 on this sketch. And I've got leased land lying in here, 80 acres.

"Mr. Watts: If your Honor please, I object to anything except the 60 acres involved in this lawsuit.

"The Court: Sustained.

"Q. (By Mr. McConnell) Will you point out to the jury the boundary line shown of your property?

* * * * * * *

"A. That blue is where the water is actually standing at the present time. Up until a short time ago this area here came over that far. And this spring all of it would run, come in here out this way and through here, spreading over this land and all below it. And at the present time this is washed out here.

"Mr. Watts: If your Honor please, I object to that as not the proper measure of damages.

"The Court: The objection will be sustained."

This testimony of Mr. Peevyhouse is difficult for us to follow, even with the exhibits in the case before us. However, no complaint was made by plaintiffs, or any sug-

gestion that the court was in error in excluding this testimony.

The defendant offered the testimony of five witnesses in the trial court; four of them testified as to "diminution in value." They were not cross examined by plaintiffs.

In their motion for new trial, plaintiffs did not complain that they had been prevented from offering evidence as to the diminution in value of their lands; on the contrary, they affirmatively complained of the trial court's action in admitting evidence of the *defendant* on that point.

In the original brief of plaintiffs in error (Peevyhouse) filed in this court there appears the following language at page 4:

> "* * * Near the outset of the trial plaintiffs dismissed their second cause of action without prejudice; further, it was stipulated * * *. It was further stipulated that the *only issue remaining in the lawsuit* was the proof and *measure of damages* to which plaintiffs were entitled * * *." (Emphasis supplied.)

In the answer brief of Garland Coal & Mining Co., at page 3, there appears the following language:

> "Defendant offered evidence that the total value of the property involved before the mining operation would be $60.00 per acre, and $11.00 per acre after the mining operation (60 acres at $49.00 per acre is $2940.00). Other evidence was that the property was worth $5.00 to $15.00 per acre after the mining, but before the repairs, and would be worth an increase of $2.00 to $5.00 per acre after the repairs had been made (60 acres at $5.00 per acre is $300.00)." (Tr. 96-97; 135, 137-138, 138-141, 143-145, 156, 158).

At page 18 of the same brief there is another statement to the effect that the "amount of diminution in value of the land" was $300.00.

About two months after the answer brief was filed in this court, plaintiffs filed a reply brief. The reply brief makes no reference at all to the language of the answer brief above quoted and *does not deny that the diminution in value shown by the record amounts to $300.00.* On the contrary, it contains the following language at page 5:

> "* * * Plaintiffs in error pointed out in their initial brief that this evidence concerning land values was objectionable as being incompetent and refused to cross-examine or offer rebuttal for the reason that they did not choose to waive their objections to the competency of the evidence by disproving defendant in error's allegations as to land values. We strongly urged at the trial below, and still do, that market value of the land has no application * * *."

Our extended reference to the pleadings, testimony and prior briefs in this case has not been solely for the purpose of showing that plaintiffs failed to complain of the court's rulings. Our purpose, rather, has been to demonstrate the plan and theory upon which plaintiffs tried their case below, and upon which they argued it in the prior briefs on appeal.

The whole record in this case justifies the conclusion that plaintiffs tried their case upon the theory that the "cost of performance" would be the sole measure of damages and that they would recognize no other. In view of the whole record in this case and the original briefs on appeal, we conclude that they so tried it *with notice* that defendant would contend for the "diminution in value" rule. The testimony to which they specifically refer in the petition for rehearing shows that the trial court properly

excluded defendant's evidence concerning lands other than the 60 acres described in the petition because such evidence was *not within the scope of the pleadings*. At no time did plaintiffs ask permission to amend their petition, either with or without prejudice to trial, so as to describe *all* of the lands they own or lease, and no evidence was admitted which could broaden the scope of the petition.

Plaintiffs' petition described 60 acres of land only; plaintiffs offered no evidence on the question of "diminution in value" and objected to similar evidence offered by the defendant; their motion for new trial contained no allegation that they had been prevented from offering evidence on this question; in their reply brief they did not controvert the allegation in defendant's answer brief that the record showed a "diminution in value" of only $300.00; and in view of the stipulation they admittedly made in the trial court, their statement in petition for rehearing that the court's instructions on the measure of damages came as a "complete surprise" and "did not afford them the opportunity to prepare and introduce evidence under the 'diminution in value' rule" is not supported by the record.

[3] We think plaintiffs' present position is that of a plaintiff in any damage suit who has failed to prove his damages—opposed by a defendant who has proved plaintiffs' damages; and that plaintiffs' complaint that the record does not show the total "diminution in value" to their lands comes too late. It is well settled that a party will not be permitted to change his theory of the case upon appeal. Knox v. Eason Oil Co., 190 Okl. 627, 126 P.2d 247.

Also, plaintiffs' expressed fear that by introducing evidence on the question of "diminution in value" they would have waived their objection to similar evidence by defendant was not justified. Vogel v. Fisher et al., 203 Okl. 657, 225 P.2d 346; 53 Am.Jur. Trial, Sec. 144.

It is suggested in a brief of amici curiae that our decision in this case has resulted in an impairment of the obligation of the contract of the parties, in violation of Article 1, Section 10, of the Constitution of the United States, and in that connection the only case cited is Sturges v. Crowninshield, 4 Wheat 122, 17 U.S. 122, 4 L.Ed. 529 (1819). In their brief, amici curiae quote language from the Lawyer's Edition notes of Mr. Stephen K. Williams, in which he summarized the "points and authorities" of one of the counsel appearing before the U. S. Supreme Court.

Sturges v. Crowninshield was an early case in which the Supreme Court considered the power of a state to enact bankruptcy laws, and the extent, if any, to which such power is limited by Article 1, Section 10 of the Constitution. The contracts concerned consisted of promissory notes executed in March, 1811, and the bankruptcy law under which the promisor claimed a discharge was not enacted until April 3, 1811. In a memorable opinion written by Chief Justice Marshall, the court held that insofar as the bankruptcy law purported to discharge the obligations of contracts executed *before its enactment*, it was unconstitutional and void.

The same situation does not exist here.

24 O.S. 1961 §§ 96 and 97, cited in our original opinion, were a part of the Revised Laws of 1910 (R.L. 1910). Sections 2889 and 2890 and have been in force in this state, in unchanged form, since that codification was adopted by the legislature in 1911. The lease contract concerned in the case now before us was not executed until 1954.

[4, 5] Nor do we agree that our decision itself, as opposed to the statutes cited therein, is controlling, impairs the obligations of the contract concerned. It may be conceded that at one time there was respectable authority for the proposition that the "contract" clause was violated by a judicial decision which overruled prior decisions upon

the strength of which contract rights had been acquired. In this connection, it should be noted that our decision overrules no prior holdings of this court upon which the contracting parties could be said to have relied. Even if it did,

> "* * * it is now definitely and authoritatively settled that such prohibition in federal and state constitutions relate to legislative action and not to judicial decisions. Thus, they do not apply to the decision of a state court, where such decision does not expressly, or by necessary implication, give effect to a subsequent law of the state whereby the obligation of the contract is impaired. * * *" 16 C.J.S. Constitutional Law § 280.

To the same effect, see 12 Am.Jur. Constitutional Law, Sec. 398.

Our decision herein overrules no prior holdings of this court, and it does not give effect to a *subsequent* law of this state. It therefore cannot be said to impair the obligations of the contract of the parties here concerned.

The petition for rehearing is denied.

HALLEY, V. C. J., and WELCH, DAVISON and JOHNSON, JJ., concur.

BLACKBIRD, C. J., and WILLIAMS, IRWIN and BERRY, JJ., dissent.

APPENDIX C

FILED
IN SUPREME COURT
OF OKLAHOMA
March 26, 1963
ANDY PAYNE, CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

WILLIE PEEVYHOUSE and LUCILLE PEEVYHOUSE, husband and wife, Plaintiffs in error,	)
-vs-	) CASE NO. 39588
GARLAND COAL AND MINING COMPANY, a corporation, Defendant in error.	)

ORDER

It is hereby ordered that the vote on the opinion in the above styled and numbered cause filed December 11, 1962 be modified as follows:

Mr. Justice Williams shall be shown as dissenting.

Done by order of the Court in Conference this 25 day of March, 1963.

W. H. Blackbird
Chief Justice

APPENDIX D

FILED
IN SUPREME COURT
OF OKLAHOMA
May 28, 1963
ANDY PAYNE CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, May 28, 1963

* * * * * * *

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS:

* * * * * * *

39588—Willie Peevyhouse and Lucille Peevyhouse, husband and wife v Garland Coal & Mining Co., a corp. Second petition for rehearing denied.

/s/ W. H. Blackbird,
Chief Justice

ATTEST:

Andy Payne,
Clerk

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

WILLIE PEEVYHOUSE and LUCILLE PEEVYHOUSE, husband and wife, Plaintiffs in error,	)	
-vs-	)	CASE No. 39588
GARLAND COAL AND MINING COMPANY, a corporation, Defendant in error.	)	

NOTICE OF THE FILING OF PETITION FOR CERTIORARI AND APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Willie Peevyhouse and Lucille Peevyhouse, husband and wife, the plaintiffs in error above named, hereby appeal to the Supreme Court of the United States from the final judgment and opinion of the Supreme Court of Oklahoma and order denying petition for rehearing, entered in this action on May 28, 1963.

This appeal is taken pursuant to Title 28 USC Sections 1257 (2), (3) and 2101 (c) and Rule 19 of the Supreme Court of the United States.

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the United States, and include in said transcript the following:

1. Transcript of oral testimony.
2. Petition in error
3. Coal lease
4. Opinion of Supreme Court and Order of the Supreme Court correcting voting on opinion of December 11, 1962

5. Dissenting opinion

6. First Petition and brief on rehearing

6A. Order denying petition for rehearing

7. Supplemental opinion on rehearing

8. Second petition and brief for rehearing

9. Order denying rehearing

10. Brief amici curiae, January, 1963

11. Copy of briefs of Plaintiffs in Error

12. Motion to stay mandate and withdraw records for appeal to the Supreme Court of the United States

The following questions are presented by this appeal.

1. The coal lease agreement by the parties settled their contractual rights as of the date of the contract in 1954 under the Oklahoma laws as defined by the Supreme Court of Oklahoma. That the Supreme Court could not change or alter that law, and in so doing in this case, violated Article 1, Section 10 of the Constitution of the United States and the Fifth Amendment thereto and Article 2, Section 15 of the Constitution of Oklahoma.

2. That Article 7, Section 3 of the Constitution of Oklahoma, and Title 20, Section 13 O.S.A. requires a majority of the 9 members of the Supreme Court to concur to decide any question. That this judgment was affirmed and modified from $5,000.00 to $300.00 by a vote of 4 members for and 4 members dissenting.

3. Whether the due process clause, Section 1 and equal protection clause of the 14th Amendment is violated by Title 23, Sections 96 and 97 O. S. A. 1951, as construed and

applied by the Supreme Court of Oklahoma in this case, as to the measure of damages for breach of contract.

/s/ Woodrow McConnell
Woodrow McConnell
Cravens Building,
Oklahoma City, Oklahoma,
and
CONNER, LITTLE & CONNER
by /s/ Leslie L. Conner
Leslie L. Conner
630-636 Hightower Building
Oklahoma City, Oklahoma
Attorneys for Plaintiffs in Error.

PROOF OF SERVICE

I, Leslie L. Conner, one of the attorneys for Willie Peevyhouse and Lucille Peevyhouse, husband and wife, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of August, 1963, I served copies of the foregoing Notice of the Filing of Petition for Certiorari and Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

On defendants in error, Garland Coal Mining Company, a corporation, by delivering copies in a duly addressed envelope, to their respective attorneys of records as follows:

To: Looney, Watts, Looney, Nichols, and Johnson, Attorneys for Garland Coal and Mining Company, a corporation, Defendants in error.
Address: 219 Couch Drive, Oklahoma City, Oklahoma.

/s/ Leslie L. Conner
Leslie L. Conner
630-636 Hightower Building
Oklahoma City, Oklahoma
Attorney for Plaintiffs in Error.